

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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ETA Case No. **Issue Date: 01 March 2004** **BALCA Case No. 2002-INA-279**  
**P2001-NJ-02475246**

*In the Matter of:*

**M. ELENA HOGAN,**  
*Employer,*

*on behalf of*

**MYRA DIAZ,**  
*Alien.*

Certifying Officer: Dolores Dehaan  
New York, NY

Appearance: Earl S. David, Esq.  
For Employer

Before: Burke, Chapman and Vittone  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arose from an application for labor certification on behalf of Myra Diaz (“Alien”) filed by M. Elena Hogan (“Employer”) pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (“the Act”) and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). The Certifying Officer (“CO”) denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer’s request for review, as contained in the Appeal File (“AF”) and any written arguments of the parties.

## **STATEMENT OF THE CASE**

On February 2, 2001, Employer filed an application for labor certification on behalf of the Alien for the position of Cook. (AF 11-14).

On February 9, 2002 the CO issued a Notice of Findings (“NOF”) indicating the intent to deny the application. (AF 20-23). The CO found that Employer’s application contained insufficient information to determine if the position of Domestic Cook actually existed in Employer’s household or if it was created solely for the purpose of qualifying the Alien as a skilled worker in violation of 20 C.F.R. § 656.20(c)(8). In her Rebuttal, Employer was required to demonstrate that there was a bona fide job offer by answering a series of questions regarding Employer’s household, along with providing the supporting documentation. (AF 20-22). Employer was also asked to submit copies of her income tax returns from the date of the application to the current year to demonstrate that she had the financial ability to pay the Alien’s salary. Additionally, Employer was required to document, in accordance with 20 C.F.R. § 656.21(b)(2), the business necessity for a worker with two years of experience as a Filipino cook. (AF 20-23).

In her Rebuttal dated April 18, 2002, Employer asserted that the Alien prepared meals two to three times a day for the household and the different visiting members of the family. (AF 25). Employer added that she entertains frequently, which involves cocktails or dinner parties. In the previous months, Employer averaged two dinners and a luncheon per week. Employer also noted that her children are outside the house from 7:30 a.m. to 6:30 p.m. Additionally, Employer submitted an amended ETA 750A, removing the word Filipino from the job description in box 13 and indicating the willingness to readvertise. (AF 25-30).

On June 4, 2002, the CO issued a Final Determination (“FD”) denying certification. (AF 36-37). The CO found that Employer successfully rebutted the restrictive requirement finding by deleting the Filipino requirement. (AF 36). Employer, however, failed to adequately document her compliance with 20 C.F.R. §§ 656.20(8) and

656.20(c)(1). The CO noted that Employer was asked to provide her entertainment calendar for the last twelve months and to provide documentation of the percentage of Employer's disposable income to be devoted to the Alien's salary. Due to Employer's failure to provide the requested documentation, the CO could not determine if the offer was a bona fide job offer and consequently, the application was denied.

On July 5, 2002, Employer submitted a document titled Motion to Reopen/Reconsider/Appeal, indicating that she had income of over \$130,000 to pay the Alien's salary and providing a copy of the twelve month calendar. (AF 31-35, 38).

The AF does not reflect that a brief was filed by Employer.

### **DISCUSSION**

Under 20 C.F.R. § 656.26(b)(1), a request for review shall be in writing, shall clearly identify the particular labor certification determination from which review is sought and shall set forth the particular grounds for the request. It is well established that where the request for review does not set forth specific grounds for review and no brief is filed, the request for review will be dismissed. *North American Printing Ink Co.*, 1988-INA-42 (Mar. 31, 1988)(*en banc*); *Bixby/Jalama Ranch*, 1988-INA-449 (Mar. 14, 1990); *Rank Enterprises, Inc.*, 1989-INA-124 (Nov. 13, 1989); *The Little Mermaid Restaurant*, 1988-INA-489 (Sept. 1, 1989).

Employer did not file a brief and in her Request for Review, she did not allege a single ground for this Panel to review. Employer limited her Request for Review to submitting a twelve month calendar and indicating that she has an income of \$130,000 to pay the Alien's salary. However, general statements of disagreement with the CO do not constitute an assignment of error and such a request for review will be dismissed. *GCG Corp.*, 1990-INA-498 (Mar. 11, 1990); *Ajem Thread Rolling*, 1990-INA-412 (May 20, 1991).

Furthermore, if the Panel were to review the facts of the case, the CO's denial of certification would be affirmed. The burden of proof, in the twofold sense of production and persuasion, is on the employer. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). The employer bears the burden both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Employer failed in her obligation to prove her case by providing an unresponsive Rebuttal. The CO requested a detailed entertainment calendar and copies of Employer's income tax returns. Employer failed to provide either. Employer's Rebuttal was limited to generalized assertions regarding the Employer's schedule and the duties of the Alien. As the CO required specific information in order to determine if the job offer was bona fide, Employer's minimalist approach to the Rebuttal failed to provide sufficient information to the CO. Denial of certification has been affirmed where the employer has made only generalized assertions. *Winner Team Construction, Inc.*, 1989-INA-172 (Feb. 1, 1990).

In the Rebuttal, Employer was provided an opportunity to prove that the job offer was bona fide. However, Employer wasted that opportunity by failing to supply a schedule of entertainment and copies of the income tax returns. The employer's last opportunity to supplement the factual issues of the case is in the Rebuttal. 20 C.F.R. § 656.24. Therefore, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be granted. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*). Employer failed to satisfy the burden in this case. We also note that we could not review the additional evidence submitted with the Request for Review, as evidence first submitted with the Request for Review cannot be considered by the Board. *La Prairie Mining Limited*, 1995-INA-11 (Apr. 4, 1997); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992).

Consequently, for the above stated reasons we dismiss Employer's Request for Review and affirm the CO's Denial. Accordingly, the following order will enter:

## **ORDER**

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth  
Secretary to the  
Board of Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.